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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY HANNA,

Defendant and Appellant.

B169215

(Los Angeles County  
Super. Ct. No. LA039633)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Kathryne A. Stoltz, Judge. Affirmed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Victoria B. Wilson and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted appellant Timothy Hanna of continuous sexual abuse (Pen. Code,<sup>1</sup> § 288.5, subd. (a)) (count 1); sexual penetration by a foreign object (§ 289, subd. (a)(1)) (count 2); forcible oral copulation (§ 288a, subd. (c)(2)) (count 3); and committing a lewd act upon a child (§ 288, subd. (c)(1)) (count 4). The jury found true the allegation that appellant committed the offense in count 1 by the use of force, violence, duress, menace and fear of immediate and unlawful bodily injury within the meaning of section 1203.066, subd. (a)(1).

The trial court sentenced appellant to 18 years in state prison. The sentence consisted of the midterm of 12 years in count 1, the low term of three years in count 2, the midterm of three years in count 3, and a concurrent midterm of two years in count 4.

Appellant appeals on the grounds that: (1) reversal of all counts or, in the alternative, conditional remand is required because the trial court committed prejudicial error under federal constitutional and state law in failing to find a *prima facie* *Wheeler/Batson* violation; (2) the trial court committed prejudicial error on all counts under federal constitutional and state law in excluding evidence of the victim's conduct showing moral turpitude; (3) the trial court committed prejudicial error on all counts under federal constitutional and state law in conditioning admission of evidence that the victim furnished marijuana to other children upon the admission of evidence that appellant furnished or offered cigarettes, marijuana, and beer to the victim; (4) the trial court committed prejudicial error on all counts under federal constitutional and state law in allowing the jury to hear evidence of three uncharged incidents involving the victim's sister and in denying a new trial motion on the same ground; and (5) the trial court committed prejudicial error on all counts under federal constitutional law in receiving propensity evidence under Evidence Code section 1108 because that statute violates the

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<sup>1</sup> All further references to statutes are to the Penal Code unless stated otherwise.

right to due process when applied to offenses of which the defendant has not been convicted.

## **FACTS**

### ***I. Prosecution Evidence***

At the time of appellant's trial, the victim in this case, Kimberly B., was 17 years old. Appellant became the stepfather of Kimberly and her older sister, Nicole, when Kimberly was five and Nicole was nine. Kimberly and Nicole lived with Donna Hanna (their mother), appellant, and appellant's two sons from a previous relationship, Michael and Daniel. Donna and appellant eventually had two boys together, Matthew and David. When Kimberly was 10, Nicole moved out of the house, and appellant became nicer to Kimberly, telling her how beautiful she was and paying more attention to her. He began to make her kiss him before she could leave her room when she was punished for misbehaving. When she turned 11, appellant used to try and make Kimberly French-kiss him. He also would touch her on top of and under her clothes, on her breasts and private parts. While Donna was gone, appellant would go in Kimberly's room and say that if she did not do things with him he would spank her, and he "used to beat the crap out of" her. He told her if she told her mom they would be out on the street with nowhere to live, and he also said he would slit her throat or beat the crap out of her if she told. He would beat her with a belt or a stick if she did not do exactly what he said. This occurred usually in appellant's bedroom.

One time when Kimberly was 11, appellant told her that if she did not give him oral sex he would beat her with a belt. She refused and he beat her with the belt. Kimberly did not tell her mom because she was afraid.

Appellant's behavior continued to be the same when Kimberly turned 12, except that appellant then tried to put his mouth on her vagina. She cried and fought him, and he pinned down her arms. Appellant once tried to do this when Donna and her son went to the store. When they returned unexpectedly, appellant made Kimberly hide in the closet. Her mother found her, but Kimberly said she was just hiding.

When Kimberly was 13, appellant would often enter her room at night and would try to put his hands under her clothes. He began trying to have sex with her when she was 14. Kimberly would lock her door against him, but appellant came in with the key one night and pulled his penis out of his pants and tried to put it in her mouth. He did get it in her mouth, but Kimberly kept closing her mouth so that he could not keep it there.

When Kimberly was 14, she went on a Memorial Day weekend camping trip with appellant, her two stepbrothers, her little brother Matt, and her friend Tiffany. Toward the end of the trip, appellant took Kimberly in his boat to a lagoon. He took off his clothes and tried to take off her clothes. He took her into the water with him and touched her breasts and put his finger in her vagina. Kimberly knocked appellant's glasses off his face. Appellant then punished her by keeping her in the tent for the rest of the trip.

On the Fourth of July, appellant entered Kimberly's room and said he would buy her cigarettes or do anything she wanted if she would either have sex with him or let him put his penis into her mouth. Kimberly refused. Appellant beat her with a stick from a broken chair until Kimberly began screaming and said her finger hurt. She told her mom that appellant beat her because she "gave him attitude." Kimberly did this because she felt guilty, believed it was her fault, and was afraid of what appellant would do to their family.

Another family camping trip was planned for August that year, but Kimberly was afraid to go, even though her mother would be there. She told her mother she thought appellant might molest her. Donna did not know what to think, and appellant told Donna that Kimberly was on drugs and not to listen to her. Kimberly then took six or seven Vicodin tablets, but her mother made her throw them up.

Appellant tried to have sex with Kimberly over 10 times when she was 14. He would try to put his penis inside her vagina. He would take her into his bedroom or go into her bedroom any time that her mother was not there. Once her mother came home and appellant told Kimberly to climb out the bedroom window. Daniel saw her climb out the window head first.

When she was 15, appellant molested her the week before Christmas. He found her outside and told her to go into her room. He then entered and touched her breasts. He tried to put her on the bed, but she ran away. On Christmas eve night, he entered her room around 3:00 a.m. and began touching her. Then he thought he heard Donna, and he ran out of the room. The next day, Kimberly received no Christmas presents, and appellant told Donna it was because she was disrespectful.

The day after Christmas in the year 2000, Kimberly went to live with her aunt, Sharleen B., and her uncle. She stayed there nine months, and returned home unbeknownst to appellant in September 2001. Donna did not want appellant to know Kimberly was there, so she told Kimberly to hide. After three days, one of appellant's sons told him that Kimberly was living there. Appellant found Kimberly sleeping in her brother's room and told her to sleep on the couch. On the following day appellant saw Kimberly outside with her friends and ordered her to go home. She knew her mother was not home, so she went to a friend's house and ran away from home.

On or around September 25, 2001, Kimberly telephoned her mother to let her know she was all right. Her mother began to cry and wanted to know why Kimberly did not want to live at home. Kimberly told her that she did not feel safe at home because appellant was molesting her. Her mother cried and told Kimberly she loved her. Kimberly told her mother she was going to San Diego and then to San Francisco where Nicole lived.

Kimberly and a friend went to San Diego by train. Because she and her friend appeared too young to ride the train, someone reported them, and they were picked up by the police. This occurred in early October 2001. Kimberly's mother arrived to pick her up the following day. Kimberly told the police in San Diego why she had run away, and the San Diego police told Donna to go to her local police. When they returned home, Kimberly told her mother that she wanted to report appellant to the police the following day.

Donna did not suspect the molestations, but had noticed appellant's unusual behavior toward Kimberly. He would go into her room and look through it and read her letters. He made copies of the key to her door. Once Donna came home and found Kimberly's room locked. She knocked and appellant opened the door. He was holding a belt and Kimberly was on the bed. Appellant said he was going to spank her because she was misbehaving, but he just left the room. Appellant grounded Kimberly many times. Once Donna found a note slipped underneath Kim's door. The note said, "'Hope you're alone when I come home. I miss your touch so much. The wind can below [sic]. The sun burns hot and yet I know I love you so. Open the door and let me in.'" When Donna confronted appellant, he said it was a song he heard on the radio and wrote down. It was Donna's "custom" to believe her husband. Donna made a photocopy of the note. When Kimberly took the Vicodin, she told Donna appellant was going to molest her. Donna merely asked Kimberly how appellant was going to molest her when Donna was going to be there. Once when Donna went shopping with Daniel, they went around the block and right back home. Donna found appellant in the living room and Kimberly in Donna's bedroom closet. In April 2001, Donna found a dating application filled out in her husband's handwriting. It was lying on top of the trash in the trash can. Donna read it and kept it. In answer to the question asking which age group he preferred dating, appellant had answered "15 to 22." When Donna asked appellant about the application, he said he had filled it out for fun.

Nicole told Donna in 1995 that appellant had massaged her back, at Nicole's request, but that he had begun sucking her back, and Nicole told him not to do that. When Donna confronted appellant, he said he had kissed Nicole's shoulder and "she went off." He said that Nicole should not wear shorts and tank tops because it would tempt him. Nicole also told Donna she was upset about a certain videotape of her that Kimberly had seen. Donna allowed Nicole to live with her former babysitter, and Nicole contacted the Department of Children and Family Services (DCFS) about the videotape. Years later, Donna found the videotape. On the tape, Donna saw a nine-year-old Nicole

and her friend changing clothes. Appellant admitted taking the tape and said he wanted to show it to Nicole when she got older.

After Nicole moved out, Donna noticed that appellant began to shower Kimberly with gifts. She also noticed that Kimberly was being punished constantly. Appellant would also punish Donna by not letting her talk on the phone and not giving her money or “just being mean.”

Donna gave the videotape, the dating survey, and the copy of the note from Kimberly’s room to police when she reported the molestation.

Nicole remembered appellant videotaping her dance recital when she was nine. Later, she and her girlfriend were changing and getting ready for bed in Nicole’s bedroom. She was not aware they were being videotaped, but she found out about the existence of the tape when she was 14 from Kimberly, who had seen it. Nicole became angry and looked for the tape but could not find it. When she asked appellant if he made the tape, he replied that he did not remember. She did not see the tape until a detective showed it to her. The relevant portion of the videotape was played for the jury at appellant’s trial. Nicole could discern that the video was shot from outside her bedroom window.

Nicole began to have problems with appellant when she turned 14. When her friends came over, appellant would always talk about sex. He would always comment about sex on television and on the way Nicole and her friends looked whenever they were alone with him. Appellant told Nicole she had a nice body and nice “butt.” Nicole hurt her back water skiing and appellant massaged it for her with her consent. Suddenly he began sucking and kissing her back and Nicole stopped him. About two weeks later she moved in with her former babysitter. After she moved, she notified an abuse hotline. When she was almost 16, she moved back home because she had nowhere to stay. Appellant hated her and was always calling her names like “whore” and “slut” and being very mean to her, but he did nothing of a sexual nature at that time. Nicole moved out after four months.

## ***II. Defense Evidence***

Donna acknowledged that she had tape-recorded a conversation with appellant about the “ongoings” with Kimberly in September 2001, but she denied she had done so secretly. She denied she was trying to collect evidence against appellant, but she did give the audiotape to a detective.

Donna denied telling a Joanne Donner or Sharleen B. that she would do anything to get the house away from appellant. She acknowledged that appellant filed for divorce in 1997 but did not follow through with it. She denied telling appellant that if he did not let Kimberly stay in the house in September 2001 that she would take the videotape to the police and report him for child molestation. She acknowledged that, on October 2, 2001, a social worker came to their home because a teacher reported appellant for whipping his sons, and Donna did not tell the social worker about Kimberly’s allegations. Donna denied that Kimberly told her she was going to make up the allegations against appellant. Donna agreed that appellant told Nicole he would give her \$1,000 dollars if she moved out, and he did. On cross-examination, Donna said she had not benefited financially in any way by reporting her husband, nor had her children.

Christopher Taylor was appellant’s neighbor for 13 years. He was good friends with appellant’s son and visited their home often. He was in Kimberly’s English class, and one day when they were arguing over something stupid she said, “I’m going to tell everybody that you date raped me.” They were in seventh grade. He was upset and called Kimberly a bitch. He was sent home, and his mother went to meet him. They went to appellant’s home and confronted Donna. In front of her mother, Kimberly denied making the statement.

Michael Hanna, appellant’s son, testified that the combined families got along at first. Then Donna and appellant began to argue about his kids and her kids. Appellant was very strict about rules and would ground them and whip them. Appellant punished Michael if he was disrespectful to Donna. Michael was sent to counseling because of problems with Donna, and social workers became involved because of all the arguing in

the family. Michael never saw any inappropriate behavior between appellant and Nicole. There were always problems between Michael and Kimberly, and Michael disliked her. Appellant took the doors off in Kimberly's and Daniel's rooms because they were sneaking out at night. Kimberly always spoke her mind, but she never told Michael that appellant had been sexually inappropriate with her.

Michael said that the problems on the Memorial Day weekend were caused by an argument between Kimberly and her friend, Tiffany, because Tiffany wanted to "hang out" with some other girls she had met. Appellant grounded Kimberly to the tent after the argument.

On the Fourth of July, Michael heard Kimberly screaming that she did not want to go and see fireworks. Kimberly came out of appellant's bedroom with Daniel, and said nothing about her hand hurting. Kimberly did receive a watch that she wanted for Christmas 2000, but her mother took it away from her, and Kimberly was upset and angry. When Kimberly moved back home in September 2001, she got in trouble by being out late with Daniel and coming home stoned. Kimberly was grounded and she ran away.

Daniel Hanna testified that social workers investigated allegations of beatings of him and Michael in 1995 when Daniel was nine. Daniel testified that there was nonstop fighting in the household among all members of the family. He never saw appellant act inappropriately with Kimberly. He did think that something "weird" was going on because Kimberly would get "shoes and stuff for just whenever she asked for them. . . ." Appellant disciplined his children a lot. Daniel did not see appellant act inappropriately with Kimberly on the Memorial Day weekend at Lake San Antonio. On the Fourth of July weekend, Kimberly did not want to go see fireworks and was "flipping out." Kimberly was jumping on the bed and "cussing" while appellant sat on the bed and waited. Kimberly began pushing appellant and he grabbed her and pulled her off the bed. Kimberly fell and said she hurt her hand. Daniel and Kimberly both sneaked out of the house a lot. Daniel once saw Kimberly climbing in appellant's window, not out of it.

Voncille (Bonnie) Wolf of DCFS first had contact with the Hanna family in April 1995. The reason for her visit was an allegation of abuse committed by the mother, who was said to have been heard screaming at the children for 10 hours straight. Wolf spoke with appellant, Donna, and all the children. Wolf then closed the case. She returned to the home in September 1998 regarding allegations of sexual abuse by Nicole, who was 16. Nicole was interviewed as she was packing to move out. Nicole said appellant was “looking at her funny.” He would throw her things out of her room and look at her bottom when she bent to retrieve them. Kimberly did not report any problems with appellant.

Maxine Bibbie was employed by DCFS and interviewed Nicole regarding child molestation allegations on October 30, 1995. Nicole told her that she and her mother had an issue between them regarding a monthly social security check that Nicole was to receive as a beneficiary of her natural father. Nicole was also angry that appellant had promised her her own room and she did not have one. Nicole said that the real problem she had with her parents was her not getting the money. Bibbie assessed all the children on the following day and spoke with Kimberly. Bibbie asked Kimberly about the video of Nicole, and Kimberly said she had no concerns about it and that it was an innocent thing. Bibbie asked Kimberly if there was anything inappropriate between her and appellant and asked if she was being abused. Kimberly replied that she was not and said she felt safe with appellant. In Bibbie’s interview with appellant, he said he made a video of Nicole in her underwear but there was no sexual intent. He said that when he kissed Nicole in 1995 it was done in a fatherly way.

Joan Donner, a neighbor of appellant’s and Donna’s, testified that she and Donna became very good friends. Donna told Donner that she was thinking of a divorce. Donner told her she should stay until she was married more than 10 years so that she could collect appellant’s social security benefits. Donna said she was looking for a way to get appellant out of the house so that she could have the house and appellant would have to pay for it. She kept saying she wished she could come up with a plan to put him

out of the house. She wanted the house and the car she drove. Donna complained that appellant did not provide enough groceries or take the kids anywhere. Donner said she personally saw appellant with armloads of groceries. Donna would take some back to get monetary refunds. Donner said she would not lie for either Donna or appellant.

Shawn Freeman, a police officer for the City of Redondo Beach, testified that she issued Kimberly a citation for possession of tobacco products and less than one ounce of marijuana. Kimberly was stopped because Freeman saw her and another girl outside on a school day. Kimberly told Freeman that the purse she carried on her shoulder, which contained the marijuana and a pipe, was not hers. Freeman ascertained that Kimberly was a runaway, and she called Donna and asked her to pick up Kimberly. Kimberly said nothing about being molested.

Tiffany Hanson, Kimberly's friend, did not recall appellant telling her to stay on shore during the camping trip. Kimberly and appellant got along that weekend, but Tiffany and Kimberly argued over a bag, and Kimberly pushed her. Appellant told them not to fight. She and Kimberly were "pretty close" and Kimberly never told her that appellant did things to her that she did not like or that he violated her sexually. Tiffany never felt uncomfortable around appellant. Kimberly never told Tiffany that appellant did something to her that weekend.

When Kimberly began living with her aunt, Sharleen B., at Christmastime 2000, Kimberly had a gash on her head from a fight with Donna. Sharleen enrolled Kimberly in school, and Kimberly began doing drugs during the school year. Sharleen tried to work with her and sent her to counseling. Sharleen thought she and Kimberly were close. Kimberly never told her of any inappropriate behavior by appellant with her. On September 5, 2001, Sharleen decided to evict Kimberly because of an issue with her son and Kimberly and drugs. Sharleen called the police to get her out of the house. Kimberly tried to come back that night. On the next day, Donna and Kimberly told Sharleen in a telephone call that appellant was trying to get Kimberly out of the house

and put her in rehabilitation, and they did not want that. They said that if appellant caused problems they would get him for rape.

Officer May Quintanilla of the San Diego Police Department interviewed Kimberly on October 9, 2001, in juvenile hall to prepare a courtesy report for the Los Angeles police. Kimberly told Quintanilla that appellant last molested her on September 5, 2001. She said he was rubbing her leg and she kicked out at him. He also touched her breasts against her will. She said appellant was drunk, and the incident occurred at night on the couch in the living room. Appellant had a whip. Kimberly did not tell Quintanilla about the incident at Lake San Antonio (the Memorial Day incident). Kimberly told Quintanilla that she had told her mother about the Fourth of July incident in which appellant tried to have her orally copulate him.

Kathy Simpson of the Los Angeles Police Department interviewed Kimberly and her mother when they went to the police station to report the abuse. Kimberly told Simpson that, on the Memorial Day weekend trip, appellant jumped in the water with his clothes on. She said appellant retrieved his glasses after she knocked them off. Kimberly did not tell Simpson that appellant molested her in September of 2001. She said the molestations began when she was 12 and did not mention any incidents that occurred when she was younger. Kimberly did not mention any incidents of appellant performing oral copulation on her or his attempting to have her perform it on him. Kimberly did not provide Simpson with any information of an injured finger as a result of any sexual misconduct. Appellant went to the police station the same day and was very cooperative.

Zophia Barrera of DCFS interviewed Kimberly on October 10, 2001. Kimberly told her appellant took his clothes off on the boat and asked her for oral sex at San Antonio Lake. She said she was “grossed out” and she ran back to where the rest of the family was. She did not mention anything happening in the water or any digital penetration. She did not recall any mention of a molestation in September 2001. Kimberly said she ran away because she was sick of living at her house and “she was afraid of that guy.” Kimberly told her she left Sharleen’s to return home because it

would be better back home. Kimberly said she did not tell her mother about the molestations until her mother picked her up in San Diego. She said that they went to dinner and discussed a “plan” for where Kimberly would go and live, and then they went to the San Diego police department.

Cynthia Levine of DCFS interviewed Kimberly in the police station on October 10, 2001. She merely confirmed that what Kimberly had told Barrera and the police was what actually happened with her and her stepfather. On October 2, 2001, she had gone to appellant’s home to investigate allegations of physical abuse relating to Daniel.

### ***III. Stipulation***

At the close of evidence, a stipulation was read into the record by the prosecutor, as follows: “Counsel, do you stipulate that Department of Children’s and Family Services investigator Hermina Ban interviewed Daniel Hanna on October 29th, 2001, and that he stated the following: ‘My sister never told me anything. I was close to her because I liked having a sister. I always wanted to have a sister. I would see suspicious stuff going on. I would see Kim come out of my Dad’s room when he was supposed to be taking a nap. First he would come out and then she would come out later. Another time my Dad was taking a nap in his room. Kimberly was in her room. My mom left. Me and my brother Mike were watching TV in the living room. Kimberly must have climbed out of her window because I saw her walk in the front of the house and I saw her climb in my Dad’s window. I never said anything to Kimberly or anyone about that incident.’” Both parties agreed to stipulate.

## DISCUSSION

### ***I. Substantial Evidence Supports the Trial Court's Decision that Appellant Failed to Show a Prima Facie Wheeler/Batson Violation***

#### **A. Proceedings Below**

During the peremptory challenge phase of voir dire, defense counsel asked to be heard at side bar for a *Wheeler*<sup>2</sup> motion. Defense counsel told the court that he objected to the prosecutor excusing Juror No. 2 (who was the fourth juror excused by the People during peremptory challenges). Juror No. 2 was the second Hispanic juror excused by the People, and defense counsel objected to that cognizable class of people being excused, since there appeared to be no reason other than race to excuse Juror No. 2.

The court agreed with the prosecutor that it was obvious why any prosecutor would have excused the first Hispanic juror (Juror No. 10) because of his negative attitudes about police officers and added, “but it doesn’t jump right out at me as to why the prosecutor would want to excuse Juror No. 2” and asked the prosecutor if she wanted to be heard on the prima facie showing as to that juror. The prosecutor stated that Juror No. 2 had indicated several times before he was seated in the box that he was concerned about his health with respect to sitting on the jury, and that was part of the reason. The prosecutor offered to provide more subjective reasons, but the court said this was not necessary at that point. When asked if he wanted to be heard further, defense counsel stated that Juror No. 2 indicated that his health was fine and that he had “checked everything” and thought he would be fine. At that point, the court stated, “All right. Very well. After considering everything the court is finding there is no prima facie showing of discrimination based on race, specifically people of Hispanic backgrounds, because I think on the surface there are reasons why a prosecutor would want to kick off Jurors No. 2 and 10.” Therefore, the court did not require the People to go into subjective reasons.

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<sup>2</sup> *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

The record shows that Juror No. 2 brought to the court's attention during voir dire that he was a diabetic and had to have meals every two or three hours. The court asked if taking frequent breaks would accommodate him, and Juror No. 2 replied that he did not know. The court asked if he could bring food and have snacks during a break, and Juror No. 2 replied that he could. The court told Juror No. 2 it was willing to work with him, but Juror No. 2 said it would be too much of a problem to bring snacks. The court asked if it would be too much of a problem for the court or for Juror No. 2, and Juror No. 2 replied "for everybody." The court said it would keep Juror No. 2 on the panel for the time being. Later, Juror No. 2 told the court that he should be all right if the sessions began at 10:30 a.m. This would allow him to have breakfast and check himself. He would have to have lunch at 1:00 p.m. The court said Juror No. 2 should let the court know if serving turned out to be too much of a hardship, but that otherwise it would keep Juror No. 2.

#### **B. Relevant Authority**

The use of peremptory challenges to remove prospective jurors solely because of group bias violates the state and federal Constitutions. (*Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*); *Wheeler, supra*, 22 Cal.3d at pp. 276-277.) Accordingly, peremptory challenges may not be used in order to exclude jurors based on their race or ethnic background. If one party believes the other is violating this rule, he must raise a timely challenge and make a prima facie case of such discrimination. (*People v. Johnson* (1989) 47 Cal.3d 1194, 1216.)

To establish a prima facie case under *Wheeler* and *Batson*, the moving party must make as complete a record as the circumstances permit, must establish that the challenged prospective jurors are members of a cognizable group, and must raise a reasonable inference that they were challenged because of their group association. (*People v. Box* (2000) 23 Cal.4th 1153, 1187-1188.) It is presumed that the prosecutor has used peremptory challenges in a constitutional manner. (*People v. Turner* (1994) 8 Cal.4th 137, 165.) This presumption is rebutted only when the defense establishes a prima facie

case that jurors were challenged only on the basis of their presumed group bias. (*People v. Williams* (1997) 16 Cal.4th 153, 187.)

When the trial court finds no prima facie case of group bias, we consider the entire record of voir dire for evidence to support the trial court's ruling. The trial court's ruling that no prima facie case has been established is entitled to "““considerable deference””" on appeal, since it is based upon the court's personal observations. Where the record suggests grounds on which the prosecutor might reasonably have challenged the prospective jurors, we will affirm. (*People v. Crittenden* (1994) 9 Cal.4th 83, 116-117.)

Having reviewed the record on appeal, we find substantial evidence supports the trial court's finding. First, appellant failed to make a record suggesting the possibility of purposeful discrimination. For example, he did not attempt to show, except for their race, how the two potential jurors were otherwise similar to jurors the prosecutor chose to retain. Appellant did not show that removing these potential jurors would mean removing all, or nearly all, Hispanic jurors from the venire. Appellant's only showing in support of his *Wheeler* motion was his statement the prosecutor had used two of her four peremptories to challenge Hispanic potential jurors. This single observation, standing alone, is insufficient to establish a prima facie case of group bias.

Moreover, appellant points to nothing in the record, nor have we found anything in our review of the entire record, to support his claim that the prosecutor's challenges were racially motivated. The record shows that Juror No. 2 was hesitant about his ability to manage his health needs while conforming to the court's schedule. Although he ultimately said he could manage, it may well be that the prosecutor believed Juror No. 2's medical requirements, which were inflexible, would hinder the juror's ability to maintain his concentration and would perhaps disrupt the proceedings during what was projected to be a four-week trial. Appellant points out that the prosecutor asked Juror No. 2 no questions during voir dire and that the information provided by Juror No. 2 indicated a favorable disposition toward law enforcement, which would make him more likely to be retained by the prosecution. These factors merely bolster the prosecutor's reference to

Juror No. 2's health problems as the reason for his excusal. It is possible that the court did not recollect at the moment of the *Wheeler* motion that Juror No. 2 had the health problems described *ante*, and therefore the possible reason for his exclusion did not "jump out" at the court. We conclude that appellant's *Wheeler* challenge is without merit.

For the same reasons, we conclude appellant's *Batson* claim is without merit. Not only was appellant not Hispanic (one of his two attorneys had a Hispanic surname), but appellant has failed to raise an inference that the prosecutor used his peremptory challenges to exclude jurors on account of their race. (*Batson, supra*, 476 U.S. at p. 96 [setting out the criteria for an equal protection claim based on use of peremptory challenges].)

## ***II. Any Evidentiary Errors Were Not Prejudicial***

### **A. Appellant's Arguments**

Appellant contends that three instances of incorrect evidentiary rulings by the trial court were prejudicial to his case and resulted in both state evidentiary error and federal constitutional error.

In the first instance, the trial court would not allow defense counsel to question Daniel, appellant's son, about an incident when Donna called the police about a missing gun. According to defense counsel, Daniel admitted he had the gun and said that he and Kimberly had concocted the plan to steal the gun and "use that for some weed." Kim's role was to distract Donna, and she did so. The court excluded the evidence under Evidence Code section 352<sup>3</sup> because the evidence was cumulative and somewhat "far afield" from the allegations in the case.

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<sup>3</sup> Evidence Code section 352 provides that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

In the second instance, the court allowed the defense to question Kimberly about an incident where she allegedly gave marijuana to a seven-year-old child, but added that any such questioning would probably open the door to the prosecutor asking Kimberly whether appellant gave Kimberly marijuana or tried to encourage her to take marijuana. According to appellant, the trial court thus forced the defense into relinquishing the right of impeachment of Kimberly in order to preserve his objection to the evidence about appellant's furnishing of illegal substances to Kimberly, which had previously been excluded.

Third, the trial court allowed the prosecutor to introduce the following evidence relating to appellant's interactions with Nicole, Kimberly's older sister: (1) a two-minute portion of a videotape secretly made by appellant of Nicole and a friend undressing; (2) Nicole's testimony of appellant's kissing and sucking her on the back; and (3) Nicole's testimony regarding sexually suggestive comments made by appellant to her. The court also denied appellant's new trial motion based on this evidence.

According to appellant, the court abused its discretion in making these rulings and violated appellant's federal constitutional rights to compulsory process, confrontation, due process, and the right to present a defense. Appellant argues that the court's rulings on the evidence were prejudicial individually and in conjunction with the other evidentiary errors.

## **B. Impeachment**

The first two errors delineated by appellant refer to the exclusion of evidence relevant to the impeachment of Kimberly with her prior bad acts involving moral turpitude. Under Evidence Code section 352, the trial court may exclude even relevant evidence, and it is within the discretion of the trial court to exclude impeachment evidence as cumulative if there is already evidence of the witness's lack of credibility. (*People v. Burgener* (1986) 41 Cal.3d 505, 525 (*Burgener*); *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352.) An abuse of the trial court's discretion under Evidence Code section 352 is established only by a showing that the discretion was exercised in a

manner that is ““arbitrary, capricious or patently absurd”” and resulted in a ““manifest miscarriage of justice.”” (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

In *Burgener*, Nola England was called as a prosecution witness. The trial court sustained the prosecution’s objections to defense counsel’s attempt to question England on the possible prior criminal activities she had participated in with another prosecution witness who was her former boyfriend. (*Burgener, supra*, at pp. 524-525.) Defense counsel argued that it was a matter of public record that the two witnesses had a long history of criminal ways, including robberies and assaults. (*Id.* at p. 525.) Defense counsel’s theory of relevance was that England had a hidden bias against the defendant that could not be made known to the jury unless the questioning regarding her prior criminal activity were allowed. (*Ibid.*) The Court of Appeal agreed that the evidence was relevant under Evidence Code section 780, subdivision (f), which provides that evidence of bias on the part of a witness is relevant, but it also agreed with the People that the evidence was cumulative. (*Burgener*, at pp. 525-526.) England had already admitted being a drug user and having lived with her boyfriend who supplied her with drugs. (*Ibid.*) The Court of Appeal determined that it was reasonable for the court to conclude that further evidence of her lack of credibility based on bias would have been cumulative, and there was no abuse. (*Id.* at p. 526.)

In the instant case, likewise, there was sufficient evidence regarding Kimberly’s character for honesty presented to impeach Kimberly’s credibility without the evidence of the gun incident and the marijuana-furnishing incident. Christopher Taylor told of Kimberly’s threat to falsely accuse him of date rape. This evidence was extremely relevant to the current charges and was powerful impeachment evidence, since it involved a false accusation of sexual misconduct and a subsequent lie to deny making the statement. Therefore, the evidence of the other two instances could reasonably be deemed cumulative. In addition, there was ample evidence of Kimberly’s bad behavior. Kimberly herself testified that she used marijuana. She had run away from home at least twice and had many behavioral problems at school. Her mother called the police several

times because of Kimberly. She was truant and detained for marijuana possession the first time she ran away. Michael testified that Kimberly and Daniel had the doors removed from their rooms because they used to sneak out at night. Sharleen testified that she kicked out Kimberly because of Kimberly's drug problems -- Sharleen believed Kimberly needed rehabilitation services -- and because she was a bad influence on Sharleen's son. This information contrasted with Kimberly's testimony that she left Sharleen's home of her own free will because Sharleen was crazy. Kimberly's testimony about other events was contradicted by numerous witnesses, such as her friend Tiffany (regarding the camping trip), Daniel (regarding the camping trip and Fourth of July weekend), Michael (about the holiday weekends), Sharleen (regarding the reason for Kimberly's departure and the motivation for reporting the abuse), and Christopher Tyler (regarding the date-rape threat).

The fact that Kimberly did not take advantage of several opportunities to reveal the abuse was thoroughly presented to the jury and argued by defense counsel. Moreover, the jury was able to observe Kimberly's demeanor as well as that of other witnesses. Counsel thoroughly argued Kimberly's lack of credibility, and the jury's request of read backs indicates it was aware of all the contradictions enumerated above. The jury thoroughly studied the evidence, never reported a deadlock, and returned a guilty verdict.

We conclude there was no abuse of discretion in prohibiting the defense questioning about the two incidents. We disagree with appellant's contention that the court forced him into bargaining away his right to have excluded the information about his furnishing illegal substances to Kimberly for the right to impeach her about furnishing marijuana to a child, and the record refutes this contention. The court merely pointed out to defense counsel the possible consequences of asking the questions he was requesting permission to pose. The trial court specifically stated that its ruling was tentative, and it had previously shown its flexibility in changing its rulings after argument and research.

Defense counsel then made his own decision regarding whether to pursue the incident in cross-examination.

Finally, we conclude that the trial court's rulings did not constitute an abuse of discretion or violate appellant's constitutional rights, assuming the federal issues were cognizable on appeal after not having been raised below. ““[N]ot every restriction on a defendant's desired method of cross-examination is a constitutional violation. Within the confines of the confrontation clause, the trial court retains wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance.” [Citation.]” (*People v. Lewis* (2001) 26 Cal.4th 334, 375.) We do not believe the trial court violated appellant's rights under the Sixth Amendment, since even if the court had allowed the information to reach the jury, no reasonable jury would have received a *significantly* different impression of Kimberly's credibility had the questioning been allowed. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680 [finding a violation of the Confrontation Clause when a reasonable jury might have received a significantly different impression of witness's credibility had the trial court not prohibited defendant from engaging in otherwise appropriate cross-examination aimed at showing possibility of witness's bias].) Likewise, the trial court's evidentiary rulings did not violate appellant's right to present a defense or his right to due process. A defendant is not denied his right to present a defense “whenever ‘critical evidence’ favorable to him is excluded.” (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53-54.) The application of the rules of evidence does not violate a defendant's right to present a defense, and although the “complete exclusion” of evidence establishing a defense could theoretically rise to the level of a constitutional violation, “the exclusion of defense evidence on a minor . . . point does not.” (*People v. Cunningham* (2001) 25 Cal.4th 926, 998-999; see also *People v. Boyette* (2002) 29 Cal.4th 381, 427-428.)

Moreover, any abuse of discretion or error would have been harmless in any event due to the quantity of evidence of appellant's guilt. There was ample evidence corroborating Kimberly's allegations. There was evidence that appellant acted

inappropriately with Nicole, five years Kimberly's elder, before Nicole left the home. Appellant secretly videotaped two nine-year-old girls undressing in Nicole's bedroom from outside the window. When giving Nicole a back massage for pain, he began to kiss and suck on her back. Appellant often told Nicole she had a nice body or nice butt, and he constantly talked about sex when alone with Nicole and her girlfriends. He told Donna to tell Nicole not to wear shorts and tank tops so as not to "tempt" him. The evidence showed that after Nicole left the home, appellant's attention turned to Kimberly. The poem found by Donna in Kimberly's room was revealing of inappropriate designs on Kimberly. Daniel told DCFS that there were suspicious occurrences with appellant and Kimberly. In light of the totality of the evidence, the exclusion of questioning regarding the two incidents was harmless under any standard. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

### **C. Nicole's Evidence**

With respect to the admission of the incidents with Nicole, we conclude that the evidence was properly admitted and appellant was not unduly prejudiced thereby. The trial court admitted the evidence under Evidence Code section 1101, subdivision (b)<sup>4</sup> as probative of primarily motive, and, secondarily, intent.

A trial court's admission of evidence under Evidence Code section 1101 is reviewed for an abuse of discretion. (*People v. Memro* (1995) 11 Cal.4th 786, 864 (*Memro*).) We will disturb a trial court's exercise of discretion in admitting evidence only when the trial court's decision exceeds the bounds of reason. (*People v. Funes*

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<sup>4</sup> Evidence Code section 1101 provides in pertinent part: "(a) [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act."

(1994) 23 Cal.App.4th 1506, 1519.) The admissibility of evidence of uncharged offenses depends upon three principal factors: “(1) the materiality of the fact to be proved or disproved, (2) the probative value of the other crime evidence to prove or disprove the fact, and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant.” (*People v. Daniels* (1991) 52 Cal.3d 815, 856.)

“To be material, the evidence need only tend to prove or disprove some fact in issue.” (*People v. Carter* (1993) 19 Cal.App.4th 1236, 1246.) Proof of motive is material in that it tends to refute or support the presumption of innocence. (*People v. Beyea* (1974) 38 Cal.App.3d 176, 194-195.) It is always admissible and often valuable in completing proof. (*People v. De La Plane* (1979) 88 Cal.App.3d 223, 246; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877.) Since a motive is usually the incentive for a crime, its probative value generally is greater than its prejudicial effect. (*People v. Beyea, supra*, 38 Cal.App.3d 176, 195.) Motive is also an intermediate fact that may be probative of intent. (*People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23, disapproved on another point in *People v. Rowland* (1992) 4 Cal.4th 238, 260.)

In *Memro, supra*, 11 Cal.4th 786, the court found that both sexually explicit and nonsexually suggestive magazines and photographs of young men and boys were admissible under Evidence Code section 1101, subdivision (b), to show intent to molest a young boy in violation of section 288. (*Memro*, at p. 864.) The court stated that the defendant’s intent was put at issue when he pleaded not guilty to the charged crimes, and the photographs found in his possession provided evidence from which the jury could infer that he was sexually attracted to young boys and intended to act on that attraction. (*Id.* at pp. 864-865.)

In the instant case, the evidence was relevant to show motive, and thereby, to show intent, as occurred in *Memro*. The videotape and the other acts revealed appellant’s interest in the bodies of young girls, and his inappropriate behavior with Nicole was relevant to show why he began imposing sexual demands upon Kimberly after Nicole

left, as well to show that he had a sexual interest in young girls that he intended to act upon.

The evidence was not more prejudicial than probative. The acts committed by appellant in the prior three instances were less inflammatory than the charged acts. Because the acts did not involve complicated facts, there was no potential for confusing the jury. With respect to remoteness, although the acts occurred at various times when Nicole was between the ages of nine and “almost 16,”<sup>5</sup> this factor alone does not compel exclusion, especially since the acts against Kimberly began when the acts by appellant caused Nicole to leave the home. Lastly, there was no undue consumption of time. Evidence of the uncharged act required essentially only one witness, Nicole, although others commented on their knowledge of the videotape. Finally, the probative value of the testimony was high, as discussed previously. This was especially true in the instant case, where the defense was based on Kimberly’s and her mother’s lack of credibility. Considering the above factors, we find no abuse of discretion.

With respect to appellant’s federal constitutional claims, even if appellant had not waived the constitutional issues he now asserts by failing to raise appropriate objections, we would conclude that the admission of this testimony, as with the exclusion of the impeachment testimony, under ordinary rules of evidence did not implicate the federal Constitution. (*People v. Marks* (2003) 31 Cal.4th 197, 226-227.)

### ***III. Admission of Evidence Under Evidence Code Section 1108***

Appellant argues that Evidence Code section 1108<sup>6</sup> violates the right to due process when applied to offenses of which the defendant has not been convicted. He

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<sup>5</sup> Nicole was approximately 22 years old at time of trial.

<sup>6</sup> Evidence Code section 1108 provides, in full: “(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352. [¶] (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any

contends that *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*), which found the statute to be constitutional in a case where the defendant had pleaded guilty to the prior offense, left open the constitutionality of the statute where the defendant has not pleaded or ever been found guilty. (See *Falsetta*, *supra*, at p. 916.) Appellant maintains that the court erred in admitting the evidence related to Nicole under Evidence Code section 1108, and that the error implicates his federal constitutional right to due process under the Fifth and Fourteenth Amendments.

Although the court admitted the complained of evidence under section 1101, subdivision (b), it instructed the jury with 2.50.01,<sup>7</sup> which is the instruction pertaining to

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testimony that is expected to be offered, at least 30 days before the scheduled date of trial or at such later time as the court may allow for good cause. [¶] (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code. [¶] (d) As used in this section, the following definitions shall apply: [¶] (1) ‘Sexual offense’ means a crime under the law of a state or of the United States that involved any of the following: [¶] (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 286, 288, 288a, 288.2, 288.5, or 289, or subdivision (b), (c), or (d) of Section 311.2 or Section 311.3, 311.4, 311.10, 311.11, 314, or 647.6, of the Penal Code. [¶] (B) Contact, without consent, between any part of the defendant’s body or an object and the genitals or anus of another person. [¶] (C) Contact, without consent, between the genitals or anus of the defendant and any part of another person’s body. [¶] (D) Deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person. [¶] (E) An attempt or conspiracy to engage in conduct described in this paragraph. [¶] (2) ‘Consent’ shall have the same meaning as provided in Section 261.6 of the Penal Code, except that it does not include consent which is legally ineffective because of the age, mental disorder, or developmental or physical disability of the victim.”

<sup>7</sup> The court read CALJIC No. 2.50.1 as follows: “Evidence has been introduced for the purpose of showing that the defendant may have been engaged in a sexual offense on one or more occasions other than that charged in this case. [¶] A sexual offense means any conduct made criminal by Penal Code section 288. The elements of that crime are set forth later in these instructions. [¶] If you find the defendant committed a prior sexual offense you may but are not required to infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition you may but are not required to infer that he is likely to commit and did commit the crime or crimes with which he is accused. [¶] However, if you find by a preponderance of the

evidence of prior sexual offenses. Appellant contends that the court made an implied ruling under Evidence Code section 1108 because the court appeared to believe that motive was a synonym for propensity. As appellant points out, the court's ruling, which we have found to be correct under Evidence Code section 1101, must be upheld even if it erroneously applied that section instead of Evidence Code section 1108. (*People v. Zapien* (1993) 4 Cal.4th 929, 976.) Furthermore, the criteria for admission of evidence under Evidence Code section 1108 are broader than the criteria for admitting evidence under Evidence Code section 1101, and a jury may consider evidence of prior sexual crimes for any relevant purpose. (*Falsetta, supra*, 21 Cal.4th at p. 911; *People v. Britt* (2002) 104 Cal.App.4th 500, 505-506; *People v. Soto* (1998) 64 Cal.App.4th 966, 984.)

In any event, we disagree with appellant's premise. In *Falsetta*, the California Supreme Court, held that Evidence Code section 1108 is constitutionally valid, and it found no undue unfairness in its exception to the historical rule against propensity evidence. (*Falsetta, supra*, 21 Cal.4th at p. 915.) In discussing the burden on the defense caused by the introduction of prior offenses, *Falsetta* implied that in that case, the burden was reduced because the defendant had pleaded guilty to the prior rape convictions that were admitted. (*Id.* at p. 916.) *Falsetta* did not, however make a prior conviction or guilty plea a requirement for the avoidance of an undue burden on the defense. The provisions of Evidence Code section 1108 requiring pretrial notice of the offenses, the limitation of the prior offenses to those of a sexual nature, and the restriction to their use in cases where sexual offenses are currently charged were deemed sufficient to prevent an undue burden from being placed on the defense. (*Falsetta*, at p. 916.) There is no basis for us to conclude that *Falsetta*'s holding that Evidence Code section 1108 is

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evidence that the defendant committed a prior sexual offense that is not sufficient by itself to prove beyond a reasonable doubt that he committed the crimes charged. [¶] If you determine an inference properly can be drawn from this evidence this inference is simply one item for you to consider along with all the other evidence in determining whether the defendant's been proved guilty beyond a reasonable doubt of the charged crime. [¶] And you must not consider this evidence for any other purpose."

constitutionally valid cannot be extended to cases in which the defendant was not actually convicted of the prior sexual offense.

As respondent has noted, *People v. Johnson* (2000) 77 Cal.App.4th 410 (*Johnson*), in addressing the use of propensity evidence admissible under Evidence Code section 1109 in domestic violence cases, stated that the fact that there was a prior conviction in *Falsetta*, but not in the defendant's case, was of no import. As the appellate court explained in *Johnson*, "[N]either the statute nor *Falsetta* requires prior convictions as a prerequisite for use of prior acts evidence. Moreover, although the existence of a prior conviction avoids a protracted 'mini-trial' to determine the truth or falsity of the prior charge, the absence of a conviction in connection with other prior acts does not necessarily mean that the evidence will entail a protracted mini-trial. That precise issue is considered in [Evidence Code] section 352 in determining whether to exclude the evidence in a particular case." (*Johnson, supra*, 77 Cal.App. 4th at p. 419, fn. 6.) Although appellant seeks to persuade this court that *Johnson* was wrongly decided, we decline to so hold.

### DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.

DOI TODD

We concur:

\_\_\_\_\_, Acting P. J.

NOTT

\_\_\_\_\_, J.

ASHMANN-GERST